

*H. Terry*



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** American Industrial Contractors, Inc.

**File:** B-236410.2

**Date:** December 15, 1989

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### DIGEST

Protest is sustained where the Small Business Administration's denial of a certificate of competency to a small business concern is based upon substantially incorrect information concerning the monetary value of the proposed award and the difference between the government's estimate and the offeror's bid.

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### DECISION

American Industrial Contractors, Inc. (AIC), protests the decision of the General Services Administration (GSA) in determining AIC not responsible and the decision of the Small Business Administration (SBA) to deny AIC a certificate of competency (COC) in connection with invitation for bids (IFB) No. GS-07P-89-HUC-0077, issued by the GSA for fire safety improvements at the Chavez Federal Building in Albuquerque, New Mexico. The protester alleges that the GSA nonresponsibility determination was not reasonable and that the SBA relied upon incorrect and incomplete information in failing to issue a COC.

We sustain the protest.

The IFB, issued on May 17, 1989, contained a base item for asbestos abatement and eight alternative bid items for fire safety improvement tasks. Bids were opened on July 11. For the base bid item plus all eight alternative items, the government estimate was \$4,598,928 and AIC's low bid was \$3,564,883, a difference of slightly more than \$1 million. The contract actually awarded, however, was only for the base item plus the first three alternatives, as to which the government estimate was \$2,863,470; AIC was the apparent low bidder at \$2,903,556; and the second low bid was \$2,966,049.

Since AIC was the low bidder, GSA commenced a pre-award survey of it. During its pre-award survey of AIC, GSA

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received a Dunn and Bradstreet Report which raised some doubt as to AIC's financial capabilities. In addition, GSA received an unfavorable report on AIC's technical qualification. Based on this information, GSA found AIC, a small business, to be nonresponsible, and accordingly, on July 21 referred the issue to the SBA for consideration of the issuance of a COC.

After a site visit, review of information provided by GSA and AIC, the SBA on August 15, 1989, declined to issue a COC to AIC.<sup>1/</sup> In its report on the protest, SBA provided a copy of the documentation of its decision in this regard, which has been released to the protester.

AIC initially filed a protest at the contracting agency on August 17 alleging that the nonresponsibility determination was improper. The contracting officer denied AIC's protest on August 22 and on the same day AIC filed its protest in our Office. On September 12, GSA authorized award to the second low bidder, notwithstanding the protest, because it found urgent and compelling circumstances would not permit it to wait for our decision in the matter.

AIC asserts, among other things, that the SBA decision to deny it a COC was based on the mistaken belief that all eight alternatives were to be awarded. AIC alleges that the GSA abused its discretion in not overriding the SBA's denial of a COC, and awarding AIC the contract as the low responsive and responsible bidder.

The SBA, and not this Office, has the statutory authority to review a contracting officer's findings of nonresponsibility and to conclusively determine a small business concern's responsibility through the COC process. Fastrax, Inc., B-232251.3, Feb. 9, 1989, 89-1 CPD ¶ 132. Our review is limited to determining whether bad faith or fraudulent actions on the part of government officials resulted in a denial of the protester's opportunity to seek SBA review, or whether the SBA's denial of a COC was made as the result of bad faith or a failure to consider vital information bearing upon a firm's responsibility. Id.

The SBA declined to issue a COC to the protester because it found that AIC lacked the financial capability to perform the contract at its bid price. The record shows that a primary consideration of the SBA in deciding not to issue a COC was its belief that there was a \$1 million difference

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<sup>1/</sup> The record shows that the SBA found no reason to question American's technical qualifications.

between AIC's bid and the government estimate. This belief was based upon the presumption that all eight bid alternatives were to be awarded rather than the three actually awarded. The SBA questioned whether AIC was financially capable of successfully performing the contract for \$3,564,883 (AIC's base bid plus all eight alternatives) since its bid was more than \$1 million below the government estimate for the base bid and all eight alternatives of \$4,598,928. This indicated to SBA that AIC's bid price may have been improvidently low.

In this regard, we note that the bid abstract forwarded by GSA to the SBA along with the COC referral contained no indication that an award of anything less than all items would be made. The referral letter itself made no reference to the dollar value of the proposed award. In contrast, the copy of the bid abstract which GSA furnished our Office as part of its report contains appropriations data and the notation "Awd. Base Bid and Alts. 1, 2, and 3. \$2,966,049," below which is an "Approved" stamp dated August 17.

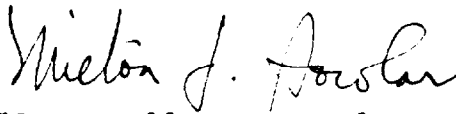
The record reveals that vital information relied upon by the SBA in deciding not to issue the COC was in fact incorrect, that is, the contract to be awarded was only for the base bid item plus alternates 1, 2, and 3, and not on the base item plus all eight alternates. This is a significant distinction because AIC's bid on the actual awarded contract was merely \$62,493 less than the second low bidder, and was \$40,086 more than the government's estimate. Thus, the SBA's belief, when it decided not to issue a COC, that AIC had left "over a million dollars on the table," was wrong.

The SBA has declined to speculate on whether it would have issued a COC if it had known the facts as shown in this protest proceeding. However, we note that only 2 days after denial of the COC, and a month before award was made to the second low bidder, the protester advised the GSA that the SBA determination was based on the erroneous belief that all eight alternatives were awarded. Notwithstanding this prompt advice, the GSA declined to reconsider its decision on AIC's responsibility or to resubmit the matter to the SBA, and, eventually, after this protest was filed, decided to proceed to award to the second low bidder.

We find that the protester was not afforded a fair opportunity for SBA to review the matter based on the correct information. In this regard, the record reflects much positive information regarding AIC's responsibility that was outweighed, in part, by the SBA's concern over AIC's very low bid for all eight alternatives.

The protest is sustained.

Since award has been made and the work is substantially underway there would be no useful purpose served by our reviewing AIC's responsibility. Accordingly, we find that the protester is entitled to recovery of its bid preparation costs, Princeton Gamma-Tech, Inc., B-228052.2, Feb. 17, 1988, 88-1 CPD ¶ 175, and its costs of filing and pursuing the protest, including any reasonable attorneys' fees incurred. See 4 C.F.R. § 21.6(d)(1), (2) (1989). By separate letter, we are advising the Administrator of the GSA of our determination. AIC should submit its claim for such costs directly to the agency. 4 C.F.R. § 21.6(f).



**Acting** Comptroller General  
of the United States